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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 947.

M. HAMPTON MAGRUDER, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MARYLAND,
Petitioner,

vs.

FREDERICK M. SUPPLEE AND ELIZABETH G. SUPPLEE, HIS WIFE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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OPINIONS BELOW.

The District Court's opinion (R. 14-25), is reported in 36 F. Supp. 722.

The opinion (R. 28), of the Circuit Court of Appeals is reported in 123 F. (2d) 399.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered November 12, 1941 (R. 29). The Jurisdiction of this Court, is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether a purchaser of real estate in Baltimore City who has paid current City and State taxes thereon, assessed prior thereto to the seller, and adjustment of which has been made to the date of sale, may, in his income-tax return, deduct from gross income that part of such taxes representing the time he was the actual owner of the property.

STATUTES INVOLVED.

Revenue Act of 1936:

> "Sec. 23: Deductions from gross income:
> "In computing net income there shall be allowed as deductions:
>
> (a) Expenses * * *
>
> (b) Interest * * *
>
> (c) Taxes Generally—*Taxes paid or accrued within the taxable year*, except * * *" (Exceptions not material here).

STATEMENT.

This is a civil suit by Frederick M. Supplee and Elizabeth G. Supplee, his wife, respondents herein, against M. Hampton Magruder, Collector of Internal Revenue for the District of Maryland, petitioner, to recover $883.51 with interest, by reason of alleged overpayment of income taxes for the taxable years 1936 and 1937.

FACTS.

In November, 1938, the Collector assessed the respondents the following deficiency income taxes for the calendar years 1936 and 1937.

1936		1937	
Tax	$3,399.71	Tax	$646.24
Interest	327.44	Interest	23.46
Total	$3,737.15	Total	$669.70

These amounts were paid by the respondents on November 21, 1938, under protest. Later, and prior to the filing of the amended complaint, appropriate claims for refund of the parts thereof hereafter mentioned were filed with and denied by the Commissioner of Internal Revenue.

Included in the 1936 deficiency assessment is $200.68, and interest, $19.33, which represents the amounts the respondents were compelled to pay the Collector by reason of the disallowance, in computing net income, of deductions for the respondents' proportionate share of the 1936 City and State taxes paid by them on certain parcels of real estate acquired during that year, adjustment of said real estate taxes in this and the following instance, as between buyer and seller, having been made to the dates of sale. Respondents had taken such deductions in their 1936 income tax return.

Similarly, included in the 1937 deficiency assessment is $646.24 and interest, $23.46, representing the amounts the respondents were compelled to pay by reason of the disallowance of deductions for their proportionate share of 1937 City and State taxes paid by them on certain other

parcels of real estate bought by them during that year. They had likewise taken these deductions in their 1937 income tax return.

The Respondents only claimed deductions for the proportionate parts of the State and City taxes for 1936 and 1937 which they had actually paid, and which covered the periods of time they were the actual owners of the properties (R. 25), and the sellers likewise, in their income tax return, claimed deductions on a similar basis (R. 20-1). The Commissioner disallowed these deductions by the respondents on the ground that those taxes had accrued on the properties prior to their acquisition by the respondents, and the payment of any part thereof by them constituted but a part of the purchase price, and was not the payment of "taxes" within the meaning of section 23(c) of the Revenue Act of 1936, under which such deductions were claimed as "taxes paid" during the taxable year.

ARGUMENT.

The sole reason advanced by petitioner for granting the writ is conflicting decisions among the Circuit Courts of Appeal. To show such conflicts petitioner cites the following cases:

Lifson v. Commissioner, 98 F. (2d) 508 (C. C. A. 8th), certiorari denied, 305 U. S. 662;
Commissioner v. Plestcheeff, 100 F. (2d) 62 (C. C. A. 9th);
Commissioner v. Coward, 110 F. (2d) 725 (C. C. A. 3d);
Commissioner v. Patrick Cudahy F. Co., 102 F. (2d) 930 (C. C. A. 7th); and
Walsh-McGuire Co. v. Commissioner, 97 F. (2d) 983 (C. C. A. 6th).

We accordingly analyze those decisions:

In *Lifson v. Commissioner, Lincoln Co.*, in 1932, owned a building which, in May, 1932, it mortgaged. The mortgage was foreclosed on October 7, 1932, and the building purchased at the foreclosure sale by the mortgagee. The law allowed one year thereafter within which the mortgagor could redeem the property. On August 16, 1933, the taxpayer, Lifson, purchased the sheriff's certificate of foreclosure sale from the mortgagee, thereby acquiring the property, and took possession on October 16, 1933. The 1933 real estate taxes on the property became a lien on May 1, 1933, although the amount of the taxes had not at that time been ascertained or levied and they were not due and payable until January, 1934. There was no adjustment of taxes to the date of sale, as in the case at bar, and the purchaser, in effect, expressly agreed to pay the accrued tax, as a part of the purchase price.

That there may be a distinction between cases where buyer and seller, by agreement, prorate the property tax, as in the case at bar, and cases where there is no such agreement, as in the Lifson case, was recognized by the Board of Tax Appeals in the *Lifson case* when (36 B. T. A., p. 594) it used the following language:

> "Since by state law the charge is fixed as of May 1, although not accurately calculated till later, a buyer after May 1 would take it with knowledge of the tax and would negotiate his price accordingly, either to exclude or to include the tax, or perhaps to prorate it. Cf. State v. Northwestern Telephone Exchange Co., 80 Minn. 17; 80 N. W. 1090. *Buying the sheriff's certificate, petitioner had no such choice. She bought the certificate with the burden of the accrued tax attached, and the cost of this certificate included the accrued tax.*" (Italics ours.).

We accordingly submit that the decision in the *Lifson case* is not in conflict with that in the present case, since the facts are materially different.

In *Commissioner v. Plestcheeff*, the facts were these: Husband and wife made a joint return for 1932. On April 5, 1931, the wife's father died, by the terms of whose will, real estate in Washington was devised to the wife. During 1932 the wife paid real estate taxes on the property so devised to her (apparently for the year 1931) and claimed a deduction accordingly on a cash basis. The Commissioner contended that liability for real estate taxes in Washington was fixed as of March 1st, even though the amount of the tax was not ascertainable on that date, and, as the testator was then the living owner of the property, the payment of said taxes by another after the property had, by devise, been acquired by him was not deductible by the new owner, the estate presumably having been alone entitled to the deduction, and then only if paid by it.

The taxpayer contended that under the state statutes, as construed by its courts, the assessed taxes did not become perfected liens until in October, when levies were made.

The Court found that the lien would ordinarily have attached on March 1st, as contended by the Commissioner, but that in that case the relationship between testator and devisee was that of grantor and grantee within a statute (Remington's Revised Statutes of Washington, Sec. 11265) which expressly provided that "as between the grantor and grantee such lien shall not attach until the first Monday in February of the succeeding year", on which date the taxpayer was the owner of the property; that hence the deduction should be allowed.

In deciding the case as it did, all the Court had to find was that the taxpayer was a "grantee" within the meaning of the special statute. Hence all other comments by the Court were mere obiter dicta which does not rise to the dignity of a judicial decision in alleging a conflict of decisions between Circuit Courts of Appeal. We accordingly submit that the Plestcheeff decision does not conflict with the decision in the case at bar.

In *Commissioner v. Coward*, the facts were these: In 1933 two parcels of improved income producing real estate were owned by one X, one of which was acquired (presumably by purchase) by Coward on October 16, 1933, and the other on January 8, 1934. With relation to these two properties Coward paid real estate taxes for the year 1934 promptly as they, in instalments, became payable, on February 1 (the amount being estimated with reference to the taxes for the previous year), May 1, (likewise estimated), August 1, and November 1, 1934 (adjusted to the estimates so as to total the by then determined amount of the 1934 tax.). Had such payments not been made a lien would have attached therefor on December 1, 1934.

In his income tax return for the year 1934, Coward claimed deductions from gross income for "Taxes paid * * * within the taxable year", under 26 U. S. C. A. Int. Rev. Code, 23 (c), which deductions were disallowed. The Commissioner contended that under the law of New Jersey all property is "assessed to the owner thereof with reference to the amount" then owned, on October 1st of each year, and that said real estate taxes accrued on that date (1933), when Coward's predecessor in title owned the property; that therefore, liability for said taxes having become fixed as of that date, their subsequent payment by Coward converted them from taxes in the ordinary sense, into a

capital expenditure, or part of the purchase price paid by Coward for said properties, and as such they were not deductible.

After examining the reported cases the Court (pp. 727-8) said:

> "Respondent's two parcels were, in theory, already 'liable' for the 1934 taxes when she purchased them. That is to say, nothing which occurred after the assessment of October 1, 1933, could alter the fact that the land itself must ultimately yield those taxes either directly through the eventual foreclosure of a tax lien, or indirectly through the medium of its then or subsequent owner's pocketbook. If, for instance, the land assumed a tax exempt status on October 2, 1933, it would nevertheless, bear its full share of 1934 tax. The presence of this liability in rem may well afford a basis for 'accruing' the tax in the accounting sense. But does its pre-existence deprive the purchaser who later discharges it of his income tax deduction?
>
> We think not. * * *".

The Court accordingly held that the deduction should be allowed. In doing so, that decision supports the decision in the present case, and, we submit, in no way conflicts with it.

In *Walsh-McGuire Co. v. Commissioner*, the decision was based on a construction of the words "accrued within the taxable year", and not on the words "taxes paid * * * within the taxable year", as in the case at bar. Section 23 (c), supra, authorizes deductions for "Taxes paid *or* accrued within the taxable year, * * *". In the Coward case, supra, the Court drew a clear distinction between the two types of cases, saying (p. 727), after referring to the Walsh-McGuire and other similar cases:

> "These have to do with the interpretation of the word 'accrued'. * * * Here, on the other hand, the word under construction is 'taxes' not 'accrued'."

Hence there is no conflict between this case and the case at bar.

In *Commissioner v. Patrick Cudahy F. Co.*, the case also turned on the word "accrued" and not on the word "taxes", and the decision was in favor of the taxpayer. We accordingly submit that it is not in conflict with the decision in the case at bar.

CONCLUSION.

The decision below is correct, there is no conflict of decisions, and the petition should therefore be denied.

Respectfully submitted,

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